A

CMA CGM

v.

BAN HOE LEONG MARINE SUPPLIES SDN BHD & ORS

B

HIGH COURT MALAYA, SHAH ALAM
TENGKU MAIMUN J
[CIVIL SUIT NO: 22NCVC-404-03/2012]
6 JULY 2012

C

CIVIL PROCEDURE: *Affidavits - Deponent of affidavits - Affirmation of - Whether affidavit in support affirmed by director of plaintiff's subsidiary company admissible - Whether deponent had personal knowledge of facts relating to case*

D

CIVIL PROCEDURE: *Anton Piller order - Ex-parte order - Setting aside, application for - Pre-conditions for making of Anton Piller order - Whether strong prima facie case shown - Whether documents sought essential to plaintiff's case - Whether danger of evidence being destroyed shown - Whether affidavit in support affirmed by director of plaintiff's subsidiary company admissible - Whether execution of Anton Piller order beyond the time spelt out in the order amounted to blatant breach justifying setting aside of order*

E

CIVIL PROCEDURE: *Discovery - Banker's books - Banker's Evidence Act 1949 - Whether order misconceived and outside the purview of law - Whether essential and relevant for plaintiff to inspect entries in account - Whether plaintiff's application material and bona fide*

F

CIVIL PROCEDURE: *Injunctions - Mareva injunction - Ex parte - Setting aside, application for - Whether affidavit in support affirmed by director of plaintiff's subsidiary company admissible - Existence of consent order that mareva injunction be stood over until the disposal of suit - Whether defendants estopped from applying to set aside*

G

CIVIL PROCEDURE: *Injunctions - Prohibitory injunction - Ex parte - Setting aside, application for - Order restraining seizure and arrest of ship and cargo as security payments due - Whether affidavit in support affirmed by director of plaintiff's subsidiary company admissible - Whether defendant prejudiced by prohibitory injunction - Whether defendant could still seek legal recourse against plaintiff for sums due and owing*

H

I

CIVIL PROCEDURE: *Costs - Security for costs - Application for - Plaintiff a foreign company with no assets within jurisdiction - Whether appropriate that plaintiff be ordered to pay security for costs*

The plaintiff, a shipping company, had a contract with the 1st defendant for the sale and supply of marine fuel ("the said contract"). The 2nd to the 5th defendants were the directors of the 1st defendant and the 6th to the 12th defendants were the wholly owned subsidiaries of the 1st defendants. The plaintiff filed an action against the defendants claiming that the defendants had jointly and/or severally defrauded and conspired to defraud or had knowingly assisted to defraud the plaintiff to deliver marine fuel to the plaintiff for an amount less than what had been confirmed to have been delivered by the 1st defendant. Upon the plaintiff's application, the court had granted *ex parte* orders for Mareva injunction, Anton Piller order, Prohibitory order and Bankers' Books (Evidence) Act 1949 order. The plaintiff now applied *inter partes* (encl. 11) for a prohibitory order to restrain the 1st defendant from seizing and arresting any of the plaintiff's vessels and or cargos as security for any outstanding payments due and owing to the 1st defendant under the said contract. The defendants applied (encl. 32) to set aside the *ex parte* orders. The defendants also applied for security for costs. The defendants contended that: (i) the plaintiff owed an amount of USD22,811,399.93 to the defendants; (ii) the orders and injunctions were oppressive in nature; and (iii) the plaintiff had no arguable case and the requirements to obtain such orders and injunctions were not met because the plaintiff did not make a full and frank disclosure and failed to give evidence that the defendants were dissipating their assets; (iv) the affidavit in support leading to the granting of the *ex parte* orders was affirmed by one Simon Patrick Whitelaw ("Simon") who deposed that he was the Managing Director of a subsidiary of the plaintiff. Hence, the defendants claimed that since Simon was not in the plaintiff company, the application leading to the *ex parte* orders was without any evidence in support; (v) the execution of the Anton Piller order by the plaintiff extended beyond the time spelt out in the order and thus it must be set aside on the ground of blatant breach by the plaintiff in the timing for its execution; and (vi) the Bankers' Books order was misconceived and outside the purview of the law.

Held (allowing plaintiff's application; dismissing defendants' application in encl 32 with costs except for the prayer for security for costs):

(1) Simon had personal knowledge of the facts relating to this case as he was part of the team investigating the matter giving rise to the plaintiff's claim. He had affirmed to matters based on records of the plaintiff to which he had access to or which he had been fully informed of. He was fully authorized by the plaintiff to affirm the affidavit on the plaintiff's behalf; *Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd* (refd). The points raised by the defendants as being material non-disclosure were without merits. (para 13)

(2) The defendants were bound by a consent order wherein they had agreed that the mareva injunction be stood over until the disposal of this suit. Hence, the defendants were now estopped from arguing on the same and until the trial of this matter, there should not be any more issues on the Mareva injunction as the consent order had superseded the application in encl 32; *Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors and Other Cases* (refd); *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* (refd). (para 30)

(3) There are three preconditions for the making of an Anton Piller order: (a) that there must be an extremely strong *prima facie* case for the applicant; (b) that the damage, potential or actual must be very serious for the applicant; and (c) there must be clear evidence that the defendants have in their possession incriminating documents or things and that there is a real possibility that they may destroy such material before any application *inter partes* can be made. (para 31)

(4) The plaintiff had a strong *prima facie* case. There were grounds to say that the documents sought were essential to the plaintiff's case and that there was a danger that the defendants would destroy the evidence in their possession. In fact, the risk of the defendants destroying evidence had materialized during the execution of the Anton Piller order as could be seen from the affidavits filed. (para 34)

(5) There was no breach on the part of the supervising solicitors in the execution of the Anton Piller order. The supervising solicitors had the discretion as regards the timing of the execution of the order as stipulated in the said order itself. (para 43)

(6) The 1st defendant was not prejudiced by the prohibitory injunction. While the 1st defendant was prevented from arresting the plaintiff's vessel, the effect of the prohibitory injunction did not prevent the 1st defendant from legitimately and lawfully pursuing its claim against the plaintiff for the sums of USD22,811,399.93. The 1st defendant could still seek legal recourse against the plaintiff for the sums due and owing for the fuel supply. (para 52)

(7) The Bankers' Books order which had been fully executed by the plaintiff was not outside the purview of the law. It was essential and relevant for the plaintiff to inspect the entries for the said account. In the circumstances of the case, the plaintiff's application was material and was made bona fide for the purpose of this action; *Goh Hooi Yin v. Lim Teong Ghee & Ors* (refd). (para 55)

(8) Given that the plaintiff was a foreign company with no assets within the jurisdiction, it was appropriate that the plaintiff be ordered to pay security for costs; *Fulcrum Capital Sdn Bhd v Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another* (refd). (para 62)

Case(s) referred to:

Anton Piller KG v. Manufacturing Processes Ltd [1976] 2 WLR 162 ***(refd)***
Arthur Anderson & Co v. Interfood Sdn Bhd [2005] 2 CLJ 889 CA ***(refd)***
Fulcrum Capital Sdn Bhd v. Dato' Samsuddin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another Case [2001] 5 CLJ 73 HC ***(refd)***
Fung Beng Tiat v. Marid Construction Co [1997] 2 CLJ 1 FC ***(refd)***
Goh Hooi Yin v. Lim Teong Ghee & Ors [1975] 1 LNS 44 HC ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Molop Corporation Sdn Bhd v. Uniperkasa (Malaysia) Sdn Bhd [2003] 1 LNS 280 HC ***(refd)***
Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors And Other Cases [2006] 8 CLJ 364 HC ***(refd)***
Renault SA v. lnokom Corporation Sdn Bhd & Anor & Other Applications [2010] 5 CLJ 32 CA ***(refd)***
Tektikal Sdn Bhd v. Sarima Kamaludin & Ors [2012] MLJ 34 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3

Other source(s) referred to:
Bullen, Leake & Allen, *Precedent on Pleadings*; 12th edn, p 341

For the plaintiff - Alvin Julian (G Rajasingam, Tracy Wong & Angkit Sanghvi with him); M/s Shearn Delamore & Co
For the defendant - Datuk N Chandran (Datuk David Gurupathan & Ranjan Chandran with him); M/s Ranjan Chitravathy & Nik

Reported by Amutha Suppayah

JUDGMENT

Tengku Maimun J:

[1] The plaintiff, a shipping company, had a contract with the 1st defendant for the sale and supply of marine fuel (the said contract). The 2nd to the 5th defendants are the directors of the 1st defendant and the 6th to the 12th defendants are the wholly owned subsidiaries of the 1st defendant. The 2nd to the 5th defendants, together with one Hean Boon Yeow are also the directors for the 6th to the 12th defendants.

[2] The plaintiff filed an action against the defendants in the Kuala Lumpur High Court based on fraud, conspiracy to defraud and knowing assistance. The plaintiff's case is that the defendants have jointly and/or severally defrauded and conspired to defraud or had knowingly assisted to defraud the plaintiff to deliver marine fuel to the plaintiff for an amount less than what has been confirmed to have been delivered by the 1st defendant.

[3] Upon the plaintiff's application, on 28 March 2012 Justice VT Singham granted an *ex parte* orders against all the defendants for:

(i) Mareva injunction (encl. 25);

(ii) Anton Piller order (encl. 28); and against the 1st defendant only;

(i) Prohibitory order (encl. 27);

(ii) The Banker's Book (Evidence) Act 1949 order (encl. 26).

[4] After granting the above *ex parte* orders, Justice VT Singham ordered that the file be transferred to the High Court at Shah Alam.

[5] Before me are two enclosures. Enclosure 11 is the plaintiff's *inter parte* application for a prohibitory order, ie, to restrain the 1st defendant, whether by themselves or by their agents and/or servants from giving effect to the terms and conditions of the said contract and from seizing and arresting any of the plaintiff's vessels and/or cargos as security for any outstanding payments due and owing to the 1st defendant under the said contract.

[6] Enclosure 32 is the defendants' application to set aside the *ex parte* orders mentioned above. The application also contains a prayer for an order that the plaintiff furnish a sum of RM200,000 as security for the costs of the defendants.

[7] The grounds for the application in encl. 32 are:

(i) The plaintiff is owing an amount of USD22,811,399.93 to the defendants;

(ii) The orders and injunctions are oppressive in nature; and

(iii) The plaintiff has no arguable case and the requirements to obtain such orders and injunctions are not met because the plaintiff did not make a full and frank disclosure and failed to give evidence that the defendants are dissipating their assets.

[8] I heard the submission of learned counsel for the plaintiff and learned counsel for the defendants for both the enclosures on 21 May 2012 and due to time constraint, the matter was adjourned to 7 June 2012 for the plaintiff to submit in reply. On 7 June 2012 before the proceedings begun, the court was informed that the defendants had filed an affidavit on 5 June 2012.

[9] Since the matter was already at the stage of submission in reply by the plaintiff, I ruled that the affidavit will not be considered so that the hearing on the two applications can be concluded without having to adjourn the matter to allow the plaintiff to file a reply to the said affidavit.

[10] I will deal with encl. 32 first. Before going into the merits of the application, there is a point raised by the defendants in respect of the identity of the plaintiff and the affidavit in support leading to the granting of the *ex parte* orders, affirmed by one Simon Patrick Whitelaw.

[11] The plaintiff is a foreign company located in France and Simon Patrick Whitelaw deposed that he is the Managing Director of CMA CGM (Malaysia) Sdn Bhd, a subsidiary of the plaintiff.

[12] It was the submission of the defendants that in law, a subsidiary company (if indeed the Malaysian company is a subsidiary of the plaintiff) is a separate and distinct legal entity from that of its parent or holding company. The deponent does not claim to be holding an office as a director or in any other capacity in the plaintiff company. Hence it was submitted that the application of the plaintiff leading to the *ex parte* orders on 28 March 2012 is without any evidence in support of their application and on this ground alone, the *ex parte* orders must be vacated or set aside.

[13] I do not agree with the submission of the defendants that given the entity of the plaintiff and the position of the deponent, there is no affidavit in support of the plaintiff's application for the *ex parte* orders. Simon Patrick Whitelaw has personal knowledge of the facts relating to this case as he is part of the team investigating the matter giving rise to the plaintiff's claim herein and he had affirmed to matters based on records of the plaintiff to which he had access to or which he had been fully informed of. And he was fully authorized by the plaintiff to affirm the affidavit on the plaintiff's behalf (see *Molop Corporation Sdn Bhd v. Uniperkasa (Malaysia) Sdn Bhd* [2003] 1 LNS 280).

[14] The grounds for setting aside the *ex parte* orders are that the plaintiff has not met the requirements for the mareva injunction and the Anton Piller order, ie, that there was material non-disclosure; that the plaintiff has not shown it has a good arguable case; has not shown dissipation of assets and that the injunction should not and cannot issue in law as the plaintiff may be adequately compensated by damages, its claim being purely monetary claim.

Whether There Was Material Non-Disclosure/Suppression Of Facts

[15] It was the submission for the defendants that there was material non-disclosure which tainted the entire order of 28 March 2012, ie, that:

(i) the plaintiff did not disclose to the court that the plaintiff owes the defendant a sum of USD22,811,399.93 as of 31 March 2012 for the fuel supplied;

(ii) the plaintiff did not disclose to the court in Kuala Lumpur that it was dispossessed of territorial jurisdiction pursuant to s. 3 of the Courts of Judicature Act 1964 which confers territorial jurisdiction in this dispute to the High Court of Selangor;

(iii) the plaintiff did not inform the court that the plaintiff's pleaded claim against all the defendants is at USD1,768,656.53 collectively but the orders eventually obtained against each defendant individually amounts to USD21,223,878.36 collectively (USD1,768,656.53 x 12 defendants);

(iv) the plaintiff suppressed facts that although the plaintiff claims systematic fraud and conspiracy to injure and corruption, no police report or MACC report was ever lodged;

(v) the plaintiff did not bring to the court's attention that the plaintiff failed to show proof from their own records to substantiate their claim that they received less fuel and/or that for the fraud to have taken place, the plaintiff's own crew and independent surveyor are involved;

(vi) the plaintiff did not disclose the fact that the plaintiff is financially unable to sustain the undertaking as to damages and is unable to pay damages and costs should these orders be set aside;

(vii) the plaintiff suppressed the fact that the plaintiff was still taking fuel from the defendant on the eve of 28 March 2012;

(viii) the plaintiff failed to disclose that the plaintiff stands to gain financially by alleging fraud and breaching the contract;

A (ix) the plaintiff failed to conduct a company search on the defendant and failed to disclose that the defendants had assets to meet the plaintiff's claim and the nature of the defendants' business was such that it was unlikely to dissipate assets;

B

[16] *Vide* the affidavit in support of the orders dated 28 March 2012 (encl. 6), the plaintiff did not indeed disclose the amount due and owing to the 1st defendant and the plaintiff did not specifically disclose that they are still taking fuel from the C defendant on the eve of 28 March 2012.

[17] However *vide* para. 49 the plaintiff avers that the plaintiff and/or its subsidiaries have continued the relationship with the 1st defendant and that there are payments due and owing to the 1st defendant from current date until approximately mid April 2012.

D

[18] To my mind the fact that the plaintiff owes the 1st defendant money for the fuel supply is the material fact, not the amount. In any event, the plaintiff could not have disclosed the sum of USD22,811,399.93 as of 31 March 2012 as submitted by E the defendants as the 1st defendant's statement of account showing the said sum is dated 31 March 2012 which is post the *ex parte* orders. And the plaintiff did disclose that the relationship continued as at the date the affidavit was affirmed and there are monies due to the 1st defendant until mid April 2012.

F

[19] The defendants also submitted that the plaintiff did not disclose that the High Court at Kuala Lumpur is dispossessed of territorial jurisdiction and that the High Court having the territorial jurisdiction is the High Court at Shah Alam.

G

[20] Given that there are only two High Courts, ie, the High Court of Malaya and the High Court of Sabah and Sarawak, I find the defendants' submission without merits. Both the High Court at Kuala Lumpur and Shah Alam had the territorial jurisdiction in respect of this matter (see *Fung Beng Tiat v. Marid* H *Construction Co* [1997] 2 CLJ 1).

[21] On the plaintiff's failure to disclose that no police report or MACC report was lodged, I am of the view that it is not a material non-disclosure as it is not a pre-condition that the plaintiff I must first lodged a police report or MACC report before filing this suit.

[22] *Vide* paras. 18 to 31 of the affidavit in support, the plaintiff had set out the practice and procedure with regards to the loading of the bunker/marine fuel by the defendants' tankers/barges to the plaintiff's vessel. The plaintiff exhibited the monthly Cargo Operation Reports belonging to the 6th-11th defendants' barges to show the short supply of the fuel.

[23] The defendants submitted that the cargo operation reports bear no names of the persons who prepared the documents and that they are without letterheads.

[24] The reports would have to be proved at the trial but at this stage and given the plaintiff's discovery during the execution of the Anton Piller order that majority of the deleted files were cargo operation reports, the reports as produced by the plaintiff, in my view supports the plaintiff's averment.

[25] In the affidavit in support of the application for the orders dated 28 March 2012, the plaintiff had also exhibited the statutory declaration by the plaintiff's surveyor, Mr Eswaran. The statutory declaration states Eswaran's discovery of the shortage of fuel and that the 1st defendant's bunker clerk, one Mr Chan had made an offer to give him bribe and to keep quiet on the shortage of fuel.

[26] The defendants' response to the statutory declaration is found at para. 19 of encl. 39:

> (c) Following my further inquiries, I have been informed by the 1st Defendant's Account Manager that from time to time until early 2011, the 1st Defendant did engage an independent contractor by the name of Chan to provide services in relation to bunker delivery. I do not know if this is the ''Chan'' referred to in the Statutory Declaration. In any event, any alleged attempt by Mr Chan to commit bribery was never authorized by any of the Defendants and ought to have been brought to the Defendants' attention so that necessary action can be taken against Mr Chan, should the allegation be proven.

[27] The statutory declaration by Mr Eswaran made reference to his superior, one Mr Naresh who is the plaintiff's employee and the plaintiff has *vide* para. 29 of the affidavit in support made averments on the Bunker Delivery Receipt and on the

A acknowledgement from the Master or Chief Engineer of the vessel. Therefore it cannot be said that the plaintiff has suppressed the fact that the plaintiff's own staff may be/are involved in the alleged fraud.

B **[28]** The other points raised by the defendants as being material non-disclosure to my mind, are without merits.

The Mareva Injunction

[29] After the filing of encl. 32 by the defendants, the parties had C appeared before me on 6 April 2012 whereby a consent order was recorded in the following terms:

> ... Maka Adalah Di Perintahkan Secara Persetujuan bahawa:
>
> (1) Defendan-defendan akan mendeposit jumlah wang D USD1,768,656.33 ke dalam satu akaun pemegang amanah bersama (joint stakeholders account) atas nama kedua-dua firma Tetuan Shearn Delamore & Co dan Tetuan Skrine.
>
> (2) Untuk membolehkan jumlah wang USD1,768,656.33 E didepositkan ke dalam akaun pemegang akaun bersama (joint stakeholders account) seperti yang dipersetujui, Plaintif akan menulis kepada pihak RHB Bank Berhad untuk membolehkan Defendan-defendan mengeluarkan jumlah wang setakat USD1,768,656.33 daripada akaun RHB Bank Berhad 6120-770000-315.
>
> F (3) Selepas jumlah USD1,768,656.33 dimasukkan ke dalam akaun pemegang bersama (joint stakeholders account) tersebut, perenggan satu (1) hingga lima belas (15) dan perenggan lapan belas (18) (a) Injunksi Mareva pihak Plaintif bertarikh 28 Mac 2012 akan ditangguhkan perlaksanaannya G serta-merta sehingga pelupusan tindakan sepenuhnya oleh Mahkamah yang Mulia ini.

(paras. 1-15 and 18(a) of the mareva injunction order relates to the dissipation of assets).

H **[30]** The defendants are bound by the said consent order wherein they have agreed that the mareva injunction be stood over until the disposal of this suit. Hence, I am of the view that the defendants are now estopped from arguing on the same and until the trial of this matter, there should not be any more issues I on the Mareva injunction as the consent order had superseded the application in encl. 32 (see *Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors and Other Cases* [2006] 8 CLJ 364; *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104).

The Anton Piller Order

[31] There are three preconditions for the making of an Anton Piller order:

(i) That there must be an extremely strong *prima facie* case for the applicant;

(ii) That the damage, potential or actual must be very serious for the applicant; and

(iii) There must be clear evidence that the defendants have in their possession incriminating documents or things and that there is a real possibility that they may destroy such material before any application *inter partes* can be made.

[32] An Anton Piller order should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties and when, if the defendant was forewarned, there is a grave danger that vital evidence will be destroyed and so the ends of justice will be defeated and when the inspection would do no real harm to the defendant or his case (per Lord Denning MR in *Anton Piller KG v. Manufacturing Processes Ltd* [1976] 2 WLR 162).

[33] Learned counsel for the defendants submitted that based on the pleadings and the affidavits there is no way that the plaintiff will be able to prove fraud beyond reasonable doubt and on this ground, the order ought to be set aside. Bullen, Leake & Allen, *Precedent on Pleadings*; 12th edn, p. 341; *Tektikal Sdn Bhd v. Sarima binti Kamaludin & Ors* [2012] MLJ 34; *Renault SA v. lnokom Corporation Sdn Bhd & Anor & Other Applications* [2010] 5 CLJ 32 were cited in support thereof.

[34] The question of the plaintiff proving fraud does not arise at this stage. However looking at the affidavits, I am of the view that the plaintiff has a strong *prima facie* case and there are grounds to say that the documents sought were essential to the plaintiff's case and that there was a danger that the defendants would destroy the evidence in their possession. In fact, the risk of the defendants destroying evidence had materialized during the execution of the Anton Piller order as can be seen from the affidavits filed.

[35] The affidavit of Richie Low, the Computer Forensic Specialist from Deloitte Kassim Chan appointed by the court (encl. 73) states *inter alia* that on 30 March 2012 he had boarded the tanker Arowana Newcastle and executed the *ex parte* order; that upon boarding the tanker, he acquired a forensic image of the data stored on a computer used by the Captain of Arowana Newcastle and he found that certain files had been deleted from the hard drive between 29 March 2012 and 30 March 2012.

[36] The affidavit further states his analysis of the recycle bin folder recovered 43 files with a last access ranging from 14 December 2011 and 30 March 2012; that the recycle bin folder also contains a special file named INFO2 which records the date as to when a file has been deleted and its original location in the hard drive prior to the deletion; that the INFO2 file lists a total of 29 files of which 26 were deleted between 29 March 2012 and 30 March 2012; that out of the 26 deleted files retrieved from INFO2, he discovered that 23 files were deleted on 29 March 2012 and three files were deleted on 30 March 2012. The list of deleted files retrieved from INFO2 included the Cargo Operation Reports.

[37] This affidavit of Ritchie Low has not been responded to by the defendants.

[38] Christopher Lesnard who was involved with the execution of the Anton Piller order on Arowana Madrid on 29 March 2012 avers *vide* para. 6 of encl. 47 that:

> Pada masa serbuan tersebut, kapten telah menerima satu Perkhidmatan Pesanan Ringkas (SMS) pada telefon bimbitnya dan saya merupakan salah satu saksi yang membaca SMS tersebut. SMS tersebut berbunyi seperti berikut:
>
> > All arowana/bc, Malaysia gov court personal will board our barges for checking. If barge is on operation, captain must stop them from going onboard our arowana. Pls clear all illegal stuff away ... This is order frm boss ... tq.

Whether By Extending The Time, The Execution Of The Anton Piller Order Was In Breach Of The Court Order Dated 28 March 2012

[39] The Anton Piller order obtained by the plaintiff allows the plaintiff to search the 1st defendant's head office, the 2nd defendant's residence and the tankers/barges belonging to the 6th to the 12th defendants between 7am to 6pm on working days.

[40] It was submitted by the defendants that the execution of the Anton Piller order by the plaintiff extended beyond the time spelt out in the order, thus it must be set aside on the ground of the blatant breach by the plaintiff in regard to the timing for its execution.

[41] The Court of Appeal in *Arthur Anderson & Co v. Interfood Sdn Bhd* [2005] 2 CLJ 889 reiterated the fact that the application and the execution of an Anton Piller order is subject to stringent requirements, guidelines and safeguards. Hence I would agree with the defendants that if the plaintiff has breached the order, then it is liable to be set aside.

[42] The plaintiff avers that the supervising solicitors had the discretion to extend the time to execute the order. In response, learned counsel for the defendants submitted that there is no such discretion in law and that an order of the court can only be varied by the court itself.

[43] I do not find any breach on the part of the supervising solicitors in the execution of the Anton Piller order. That the supervising solicitors had the discretion as regards the timing of the execution of the order is stipulated in the said order itself. Paragraph 5(a) of encl. 28 states:

> Perintah ini hanya boleh disampaikan antara pukul 7.00 pagi dan 6.00 petang pada hari bekerja yang bukan cuti am melainkan Peguamcara Menyelia berpendapat bahawa memang suaimanfaat sekiranya pelaksanaan Perintah ini diteruskan di luar masa atau hari tersebut.

[44] On 29 March 2012, the Anton Piller order was executed on the 2nd defendant's residence at No. 3 Jalan Ibus, Southern Park, Klang. Mr Hean Boon Yeow was the person who received the team involved in the execution. Hean Boon Yeow is the son of the 2nd defendant. He is also the General Manager of the 1st defendant and a director of the 6th to the 12th defendants. Hean Boon Yeow said that the place was his house and that he lives there with his parents, wife and children.

[45] The supervising solicitor, Suaran Singh affirms an affidavit in respect of the execution of the Anton Piller order on the 2nd defendant's residence (encl. 87). He states:

> (6) Seperti diperuntukkan di bawah Perintah tersebut, saya telah mencipta satu akaun e-mel dalam kapasiti saya sebagai Peguamcara Penyelia, untuk tujuan mengajukan kesemua

e-mel dalam akaun e-mel **byhean@msn.com** (''akaun e-mel tersebut'') kepada akaun e-mel yang baru dicipta oleh saya. Oleh kerana saiz besar akaun e-mel tersebut yang mengandungi lebih daripada 7000 e-mel, saya telah difahamkan oleh wakil Ernst & Young bernama Lim Cheng Hock bahawa proses yang Iebih cepat dan efektif adalah untuk memuat turun kesemua e-mel tersebut di dalam satu cakera keras.

(7) Namun demikian, saya telah mendapati bahawa proses memuat turun tersebut juga adalah sangat perlahan. Pada masa ini, saya telah bertanya kepada Hean Boon Yeow sama ada beliau mempunyai sebarang bantahan jika kami meneruskan pelaksanaan Perintah tersebut melepasi jam/waktu 6.00 petang. Encik Hean Boon Yeow telah memberi kebenaran untuk membolehkan kami meneruskan proses memuat turun tersebut.

(8) Memandangkan kelembapan kelajuan proses memuat turun tersebut, saya telah mencadangkan kepada Hean Boon Yeow, antara Iainnya, untuk memberikan kepada saya kata laluan akaun e-mel tersebut agar ianya boleh disekat buat sementara waktu (sehingga keesokkan hari) supaya proses memuat turun tersebut boleh disambung pada hari seterusnya. Beliau enggan bersetuju kepada cadangan itu dan telah menyatakan kepada saya bahawa beliau memerlukan akses kepada akaun e-melnya sepanjang masa.

(9) Beliau seterusnya telah menyatakan kepada saya bahawa, jika boleh, beliau menginginkan agar segala proses memuat turun diselesaikan pada hari yang sama. Beliau juga mengulangi beberapa kali kenyataan bahawa walaupun proses memuat turun tersebut akan mengambil masa sepanjang malam, beliau tidak mempunyai sebarang bantahan terhadapnya.

[46] The same facts are contained in the report of the supervising solicitor Josephine Ng Bee Leng (encl. 83) which states:

5.35pm

35. There is a problem with the desktop in the TV Room. The transferring of Mr. Hean's MSN account's emails is very slow and the forensic team estimates that based on the current speed of transfer, it will be midnight before the transfer can be completed. The slowness is due to i) the sluggish internet speed and ii) the volume of the mails; 7000 over emails which translated to about 2.2 gigabytes.

36. Suaran speaks to Mr Hean about allowing him to change the password for the email account and also allowing the Supervising Solicitors to bring the hard drive of the computer back to the their office so that the transferring and imaging of the emails and desktop can be continued tomorrow, thus allowing everybody to conclude today's search in a timely manner and in accordance with the time stipulated in the Order. Mr Hean however is reluctant to allow the password to be changed for this account as he says that this is the main email account which he uses daily for his private and business matters. He also does not agree for the desktop to be taken away. He insists that everything necessary be done and completed in his home today. Mr Hean even asks that the parties camp overnight in his place if necessary as he does not want anyone to return to his house tomorrow.

[47] In respect of the 1st defendant's business premises, the execution of the order is explained in the affidavit of Peh Khaik Kew, the supervising solicitor (encl. 89):

(8) Pada 29 Mac 2012, pelaksanaan Perintah tersebut telah berakhir pada jam 7.50 petang. lni adalah kerana saya bersama dengan Peguamcara-peguamcara Penyelia berkenaan telah membuat keputusan secara kolektif untuk membenarkan pelaksaan Perintah tersebut berterusan.

(9) Kami telah membuat keputusan tersebut kerana pemeriksaan di bawah Perintah tersebut hanya bermula pada jam 2.50 petang, walaupun is sepatutnya bermula pada jam 1.25 petang. Dengan itu, kami berpendapat bahawa memang suaimanfaat untuk pelaksanaan Perintah tersebut diteruskan di luar masa.

(10) Pada 30 Mac 2012, pemeriksaan di bawah Perintah tersebut sebenarnya telah berakhir pada jam 6.00 petang. Tetapi pengimejan komputer-komputer yang telah diambil dari Premis tersebut tidak dapat dihabiskan. Wakil-wakil Defendan Pertama dan Defendan Kelima telah meminta agar pakar forensik menghabiskan proses pengimejan ke atas tiga (3) komputer Jabatan Akaun Defendan Pertama.

(11) Selepas mendengar permintaan wakil-wakil Defendan Pertama dan Defendan Kelima, kami telah membuat keputusan untuk memanjangkan masa pelaksanaan Perintah tersebut agar pakar forensik dapat menghabiskan proses pengimejan ke atas tiga (3) komputer Jabatan Akaun Defendan Pertama tersebut.

A (12) Defendan Pertama telah mengesahkan bahawa beliau tidak ada bantahan dan membenarkan pemanjangan masa perlaksanaan Perintah tersebut. Sesalinan pengesahan bertulis bertarikh 30 Mac 2012 ... ditanda sebagai Eksibit PKK 2.

B **[48]** Exhibit PKK 2 bears the signature of the 5th defendant confirming that the 1st defendant has no objection and consented to extend the time for execution of the order beyond 6pm on 29 March 2012 and for the execution to continue on Saturday 31 March 2012 and Sunday 1 April 2012 from 9am-7pm respectively.

C

[49] In view of the fact that the order dated 28 March 2012 confers the discretion on the supervising solicitors and in view of the consent given by the defendants, the defendants, to my mind cannot be heard to complain that there was a breach of the D stipulated time for the execution of the Anton Piller order.

The Prohibitory Injunction Order

[50] The application for the prohibitory injunction order in encl. 11 is supported briefly, by the following grounds:

E

(i) That the facts set out in the plaintiff's statement of claim and the affidavit in support gives rise to an action for fraud, conspiracy to defraud and knowing assistance against the defendants;

F

(ii) That the plaintiff has a good arguable case and cause of action against the defendants;

(iii) That as at the date of the application, there are payments due and owing to the 1st defendant from the plaintiff from the G current date up until approximately mid August 2012;

(iv) That based on prevailing circumstances as pleaded in the statement of claim and the affidavit, it would be futile for the plaintiff to make further payments to the 1st defendant in view H of the fact that the plaintiff has grounds to believe that there is a real risk that the defendants would seek to dissipate or otherwise dispose of their monies and/or assets thereby frustrating the plaintiff from prosecuting the action and/or enforcing the judgment that may be obtained against the I defendants.

[51] The defendants submitted that as the plaintiff had admitted that there is a certain sum due from the plaintiff to the 1st defendant, it is not possible for the plaintiff to get an order to obstruct the 1st defendant from legitimately and lawfully pursuing its claim as against the plaintiff and that the process of arresting vessels is but a part of the several processes made available to the 1st defendant by law towards recovery of monies owing to it by parties like the plaintiff.

[52] My view is that the 1st defendant is not prejudiced by the prohibitory injunction. While the 1st defendant is prevented from arresting the plaintiff's vessel, the effect of the prohibitory injunction does not prevent the 1st defendant from legitimately and lawfully pursuing its claim against the plaintiff for the sums of USD22,811,399.93. The 1st defendant can still seek legal recourse against the plaintiff for the sums due and owing for the fuel supply.

Bankers' Books (Evidence) Act 1949

[53] The application is for the plaintiff's discovery and tracing of monies received by the 1st defendant in consequence of the alleged fraud perpetrated by the defendants. Two accounts with RHB Bank and one with HSBC Bank Malaysia Berhad had been identified which the plaintiff believes that the transaction between the plaintiff and the 1st defendant involves monies deposited in the abovementioned accounts

[54] In respect of the Bankers' Books order, the defendants submitted that the order was totally misconceived and outside the purview of the law and ask the court to make an order that the documents taken by the plaintiff and all other information taken pursuant to the order be returned to the 1st defendant as the 1st defendant fears that the said documents may be used by its competitors to discover the 1st defendant's business strategy that it has built over 40 years which will result in the 1st defendant's business being destroyed completely.

[55] I do not agree that the Bankers' Books order which has been fully executed by the plaintiff is outside the purview of the law. It was essential and relevant for the plaintiff to inspect the entries for the said account. In the circumstances of the case, I am of the view that the plaintiff's application is material and was made *bona fide* for the purpose of this action (see *Goh Hooi Yin v. Lim Teong Ghee & Ors* [1975] 1 LNS 44).

[56] The defendants had also submitted that the orders made against the defendants on 28 March 2012 produced very serious and catastrophic consequences to the defendants; that the defendants are dispossessed with a lot of documents related to their day to day business operation and that the 1st defendant has not been able to take new orders from its customers; that an approximate amount of USD19.5 million payments from foreign customers paid by T.T cannot be credited into the 1st defendant's account due to the mareva order.

[57] The plaintiff affirmed *vide* encl. 55 that all documents, be it computer hard drives or physical documents had been returned to the defendants. This has not been denied by the defendants. That the defendants were dispossessed with a lot of documents cannot therefore stand.

[58] Further, by para. 7 of the Third Schedule of the Anton Piller order (encl. 29) the plaintiff had given the following undertaking:

> Tidak akan, tanpa kebenaran Mahkamah, menggunakan sebarang afidavit, ikrar, maklumat, barang, bahan, dokumen dan/atau mana-mana Barangan Disenaraikan dalam Jadual 2 di dalam ini, yang diperolehi akibat daripada pelaksanaan Perintah Mahkamah yang diberikan selepas ini, atau untuk memaklumkan mana-mana orang lain tentang prosiding ini sehingga tarikh perbicaraan, kecuali untuk meneruskan tuntutan terhadap Defendan-defendan atau terhadap pihak-pihak ketiga yang terbabit dalam tindakan salah yang sama bagi tujuan melindungi hak dan kepentingan mereka yang menjadi subjek tindakan ini di Malaysia atau di tempat lain.

[59] I do not find that the defendants were in fact faced with catastrophic consequences. As submitted by learned counsel for the defendants, since the mareva order was issued and partly lifted by consent, the defendant has continued to do business.

Security For Costs

[60] The defendants submitted that the plaintiff's undertaking as to damages is useless as the plaintiff is in a poor financial position, having incurred a loss of 23 million Euros last year with a further 4 billion Euros in debt.

[61] The plaintiff on the other hand avers that it is a financially sound company, being the third largest shipping group with a multi million Euro business and that it has an annual turnover that is substantially higher than that of the defendants.

[62] What is certain is that the plaintiff is a foreign company and has no assets within the jurisdiction and the court is empowered to order security for costs if it is appropriate in the circumstances of the case (*Fulcrum Capital Sdn Bhd v. Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another Case* [2001] 5 CLJ 73).

[63] Given that the plaintiff is a foreign company with no assets within the jurisdiction, I am of the view that it is appropriate that the plaintiff be ordered to pay security for costs.

[64] To conclude, the plaintiff's application in encl. 11 is allowed with costs in the cause. The defendants' application in encl. 32 is dismissed with costs except for prayer 5 whereby the plaintiff is ordered to give security for costs in the sum of RM200,000 within 14 days hereof.